Supreme Court, U.S.
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No. 04–536

IN THE

Supreme Court of the United States

CITY OF NEW ORLEANS,

Petitioner,

v.

MUNICIPAL ADMINISTRATIVE SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

While the City disputes MAS's characterization of the City's settlement agreement with BellSouth, and likewise, disputes MAS's claims for additional contingency fees under the Agreement for Professional Services ("Agreement"), it is content to "agree to disagree" with MAS on those issues in the context of this Petition for Writ of Certiorari. In the event that this Honorable Court grants a writ of certiorari and the relief sought by the City in its petition, those substantive issues will be determined by a Louisiana state court, applying Louisiana law, as was originally intended by the parties when they entered into the Agreement. Those issues were confined to a footnote in the City's petition simply to provide a general background of the substantive dispute between the parties, and are not relevant to this Court's determination of whether it should grant the City's petition.

The sole focus of this Petition for Writ of Certiorari is the propriety of the lower courts' refusal to remand this case to state court, in the face of a contractual clause in which MAS consented and yielded to the jurisdiction of the "State Civil Courts of the Parish of Orleans" and "waive[d] any pleas of jurisdiction". When the City argued for remand to the federal district court and Fifth Circuit Court of Appeals, it framed its argument within the context of the controlling precedent of the Fifth Circuit, which has historically and consistently applied the "clear and unequivocal waiver" standard to forum selection clauses in contracts. The City properly relied on Fifth Circuit jurisprudence to argue that MAS had waived its right to removal.

REASONS FOR GRANTING THE WRIT

In its Petition for Writ of Certiorari, now that the City is no longer constrained by the Fifth Circuit's controlling precedent, the City has properly brought to this Court's attention the fact that there exists a conflict among the circuits over the standard used to determine whether a forum selection clause constitutes waiver of the right to removal. The City respectfully submits that this Court, which has never addressed this issue, should render a pronouncement to provide a uniform standard to be used by the circuits. The City further submits that the standard of basic contract interpretation, rather than heightened scrutiny, is the better standard to use in interpreting a common contract clause.

A. A petitioner is not required to argue a conflict in the circuits to the lower courts when faced with clear, controlling precedent within a circuit.

In its first argument, MAS appears to have confused "reasons for granting a writ" (conflict in the circuits) with the issue that ultimately will be decided if a writ is granted (whether MAS waived its right to removal). MAS contends that the City somehow waived its right to argue that there is a conflict in the circuits, or to challenge the Fifth Circuit's test for waiver, simply because the City did not point out this conflict or challenge the Fifth Circuit's controlling precedent in the proceedings below. However, it is not the function of the lower courts to resolve conflicts in the circuits, and it would be inappropriate to ask them to do so. Likewise, the City could not legitimately ask the lower courts to ignore the Fifth Circuit's test for waiver, as they are bound to follow the controlling Fifth Circuit precedent. These functions belong uniquely and exclusively to this Court. The City did not waive any "issues" by failing to ask a lower court to act beyond its authority.

The fundamental issue raised by the City's Petition for Writ of Certiorari is whether MAS waived its right to removal. This issue has, in turn, generated the two questions presented for review because there is a conflict in the circuits. However, the fundamental issue was clearly raised below, beginning with the City's Motion to Remand, supported by several memoranda, and preserved in its appeal to the Fifth Circuit. "Once a federal claim is properly presented, a party can make any argument in support of that claim; **parties are not limited to the precise arguments they made below**." *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245, n. 2, 120 S.Ct. 2180, 2186, n. 2, 147 L.Ed.2d 187 (2000). Moreover, this Court may review the applicability of a particular legal standard *sua sponte*. *Washington v. Davis*, 426 U.S. 229, 236, n. 8, 96 S.Ct. 2040, 2046, n. 8, 48 L.Ed.2d 597 (1976).

Having raised the issue of remand in the lower courts, the City argued its position within the context and parameters of the controlling precedent. In the Fifth Circuit, the "clear and unequivocal" test is firmly entrenched in the jurisprudence, as is evident from the numerous cases cited by MAS. Had the City opted to argue in the lower courts for the application of conflicting authority or suggest that the "clear and unequivocal" test is too stringent a standard, it certainly would not have succeeded.

It is hornbook law that in a hierarchical system, decisions of a superior court are authoritative over inferior courts. *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004). Just as the court of appeals must follow decisions of the Supreme Court whether or not they agree with them, see *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104

L.Ed.2d 526 (1989), so district judges must follow the decisions of an appellate court whether or not they agree. *Reiser*, 380 F.3d at 1029; *Xiong v. Minnesota*, 195 F.3d 424 (8th Cir. 1999). Appellate courts are bound to apply circuit precedent until it is either overruled *en banc* or superseded by a decision of the Supreme Court. *Chisolm v. Transouth Financial Corp.*, 95 F.3d 331 (4th Cir. 1996). An appellate precedent remains the law of the circuit until reversed, vacated or remanded, even if the controlling precedent has been stayed. *White v. Johnson*, 79 F.3d 432 (5th Cir. 1996). As a litigant before the lower courts, the City was bound by these same restrictions.

Accordingly, the City argued its position within the framework of controlling Fifth Circuit precedent, *i.e.*, that MAS's waiver clearly and unequivocally demonstrated the intent of the parties to have MAS waive its right of removal. Having lost its argument before the two lower courts, the City is now free to ask this Court to consider the less stringent standard of the circuits in conflict with the Fifth Circuit, and resolve this issue, using any argument available in support of its claim. *Harris Trust Bank*, 120 S.Ct. at 2186, n. 2.

B. The Circuit split is recognized by courts and commentators alike.

The City stands by its discussion of the conflicting case law, and will not belabor its points with repetitive argument. Understandably, MAS carefully selected cases in order to show a "uniform approach", however, this argument is belied by the language of the courts and commentators themselves who recognize the existence of a conflict in this area. The cases and scholarly articles *not* discussed by MAS confirm the existence of a conflict which requires addressing by this Court. (*See* Pet. at 12-13, n. 8.)

MAS claims that the cases recognizing a waiver of removal consistently involve clauses that give the plaintiff the exclusive right to choose the venue. However, the converse of this premise is not necessarily true. There are also decisions recognizing waiver of removal rights, in which the plaintiff was *not* given an exclusive right to choose venue *per se*, but removal is precluded because the clause would make no sense if interpreted otherwise. For example, in *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659 (2d Cir. 1988), the court held that inclusion of a forum selection clause makes little sense unless it precludes removal, even though there was no express waiver of removal or exclusive right given to the plaintiff to choose venue. *See also Milk 'N' More v. Beavert,* 963 F.2d 1342, 1346 (10th Cir. 1992).

The clause and contract in the instant case fall within this scenario, in that the magic words "exclusive" and "venue" were not used, but the waiver clause makes little sense unless the waiver is interpreted to preclude removal. The clause in the instant case has two prongs which are separate but related, and do not make sense unless interpreted to preclude removal. First, MAS agreed to "consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans". Second, MAS agreed to "waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor." The first prong obviously refers to personal jurisdiction, because a party cannot "consent and yield" to subject matter jurisdiction. The second prong is more broad, in that MAS agreed to waive **any** pleas of jurisdiction on account of residence–not just personal jurisdiction. Nevertheless, MAS's notice of removal invoked the very plea of jurisdiction which it had agreed to waive.

MAS states in ¶ 2 of its Notice of Removal, "This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) since the parties are of diverse citizenship and the

amount in controversy exceeds the sum of $75,000.00, exclusive of interest and costs." MAS continues in ¶4 by alleging that it is a Texas corporation with its principal place of business in Texas, and is therefore, a citizen of the State of Texas. These allegations constitute a "plea of jurisdiction on account of the residence" of MAS being diverse to that of CNO, which is precisely what MAS had agreed to waive.

Unlike other cases in which parties agreed to waive objections to *in personam* jurisdiction, MAS's waiver is clearly not limited to pleas of personal jurisdiction. *See, e.g., Global Satellite Communication Co. v. Stramill U.K. Ltd.*, 378 F.3d 1269, 1273 (11th Cir. 2004) (waiver of *in personam* jurisdiction); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75 (9th Cir. 1987) (grant of jurisdiction over the parties). Rather, it gave the City a broad, unqualified waiver of ***any pleas of jurisdiction***. MAS attempts to equate this waiver with a non-exclusive grant of jurisdiction to a court in Louisiana. However, "any pleas of jurisdiction" must include more than simply personal jurisdiction because the term "jurisdiction" means more than personal jurisdiction. Thus, the waiver necessarily includes pleas of jurisdiction offered to effectuate removal. Otherwise, the two-pronged jurisdiction/waiver clause would serve no purpose and make little sense.

Of course, the lower courts in the instant case never considered the logical implications of the waiver clause herein, because they simply applied the "clear and unequivocal" test and found that the clause did not clearly select an exclusive venue. The Fifth Circuit test precluded further interpretation of the clause or consideration of the parties' intent. Yet, had this case been brought in the Third, Tenth or Eleventh Circuits, the courts would have recognized that the entirety of MAS's agreement to "consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans", and "waiver of any pleas

of jurisdiction" constituted a waiver of its removal rights. Because of this variance in results among the circuits on an important federal question, this Court should grant a writ of certiorari.

C. Ordinary principles of Louisiana contract law require a finding that MAS waived removal.

Under Louisiana law of contract interpretation, where a provision is clear and does not lead to any absurd consequences, "no further interpretation may be made in search of the parties' intent," pursuant to Louisiana Civil Code Article 2046. The stipulation in the Agreement not only consents and yields to jurisdiction, it specifically references a particular court and states that defendant waives "any pleas" of jurisdiction "on account of residence elsewhere of the undersigned Contractor."

Moreover, Louisiana law also dictates that contract provisions be interpreted in a manner that they are rendered effective. Louisiana Civil Code Article 2049 specifically states that a provision "susceptible of different meanings must be interpreted with a meaning that renders it effective and not with one that renders it ineffective." Thus, if a court does not agree that the clause at issue is clear, then it must give it a meaning which makes it effective. By permitting MAS to remove this lawsuit from "the State Civil Courts of the Parish of Orleans" on the basis of its residence in Texas, the lower courts rendered the entire purpose of this provision ineffective, contrary to Louisiana law.[1]

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[1]These arguments of contract interpretation may seem familiar to MAS, because the City raised these points at both the trial and appellate court levels, further indicating that these issues are properly before this Court, and not waived, as MAS

In its brief, MAS contends that Louisiana law would require heightened scrutiny because statutory rights are involved. (Opp. at 10.) However, this application of that rarely-applied principle[2] would fly in the face of federal decisions which hold that the removal statutes are construed strictly, and generally against removal. As noted by a court and commentator, "for 'approximately five score years' the federal courts 'have construed the removal statutes *strictly* and, on the whole, *against* the right of removal,'" *Foster v. Chesapeake Insur. Co.*, 933 F.2d 1207, 1217, n. 15 (3d Cir. 1991), quoting *Moore's* ¶ 0.157[1.-3] at 38. This Court has endorsed the validity of forum selection clauses and championed parties rights to freedom of contract. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-12, 92 S.Ct. 1907, 1913-14, 32 L.Ed.2d 513 (1972). The "clear and unequivocal" standard, based on either the Fifth Circuit test or the seldom-used Louisiana principle fails to consider the *constrictive* rather than *expansive* nature of the right of removal, and should not apply to issues of removal.

Accordingly, the more applicable principles of contract interpretation–requiring that contract provisions be interpreted in a manner that gives them meaning and does not lead to absurd consequences–must govern the interpretation of this waiver clause. As noted in the preceding section, a finding that

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claims in its Brief in Opposition.

[2]The principle quoted by MAS is jurisprudential, and is not reflected in the Louisiana Civil Code. Courts tend to apply it when protecting the rights of parties with unequal bargaining power. The case cited by MAS involved a waiver of employee rights conferred by the workers' compensation statute. Naturally, the court saw fit under those circumstances to ensure that the employee's waiver was clear and unequivocal.

the waiver of "any pleas of jurisdiction" pertains only to personal jurisdiction (which was already bestowed by MAS's agreement to consent and yield to jurisdiction) would render that clause superfluous and nonsensical. MAS's waiver of "any pleas of jurisdiction" must mean that MAS waived its right to remove and plead diversity jurisdiction.

D. The City is entitled to a trial by a Louisiana Court.

The City obtained a contractual agreement from MAS that potential litigation would be in the State Civil Courts for the Parish of Orleans. The City filed suit in that court. When MAS removed the case to federal court, the City sought remand of the case. After trial, the City urged remand as its first issue on appeal. In short, the City did everything in its power to enforce its contractual right to litigate in state court.

MAS now contends that even if the City was correct all along, this Court should still refuse the writ. It certainly is not the City's fault that this case was fully litigated in federal court. MAS vigorously resisted remand at every stage, even though it had agreed to waive any pleas of jurisdiction. If either party should bear the burden of this error, it should be MAS, which refused to abide by its waiver. MAS certainly should not be rewarded for reneging on its agreement simply based on the longevity of its erroneous position!

The circumstances in the instant case are completely distinguishable from the case on which it relies for authority that it is now "too late" to remand this case. In *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 75, 117 S.Ct. 467, 476, 136 L.Ed.2d 437 (1996), the suit was improperly removed where the trial court erroneously believed that diversity had become complete, when in fact, the non-diverse party remained in the litigation through a subrogation claim. However, before trial, the non-diverse

party was dismissed and diversity became complete. The impediment to jurisdiction had been removed before judgment was rendered, therefore no purpose would be served by vacating the judgment. This Court's decision hinged on the fact that "no jurisdictional defect lingered through judgment in the District Court". 519 U.S. at 77, 117 S.Ct. at 477. It does not advocate "judicial economy" over correcting erroneous decisions.

By contrast, in the instant case, no circumstances surrounding the contractual waiver changed. By the time of judgment, MAS was still bound by the same contractual obligations as existed when it removed the suit from state court. The City never conceded that MAS had a right to removal, and it never withdrew its objection to trying its claim in federal court. Accordingly, the same impediment existed at the time of judgment, and that judgment should be vacated.

If this Court were to grant certiorari, and ultimately remand the case for trial in state court, it would serve as a warning to other parties bound by jurisdictional and forum selection clauses to weigh their position carefully when removing a suit to federal court. Such a message establishes a far better policy than rewarding a party's persistence and refusal to abide by its agreement with a multi-million dollar judgment. Accordingly, the posture of this case should not discourage this Court from granting a writ of certiorari.

Respectfully submitted,

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